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Observations by the Government of the Federal Republic of Germany

Note by the Secretariat

The Government of the Federal Republic of Germany has submitted to the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) the following observations in order to provide the Working Group with additional information for its deliberations. The text of the observations is reproduced as an annex to this note in the form in which it was received by the Secretariat, with formatting changes.

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Annex

Observations by the Government of the Federal Republic of Germany

1. Working Group I has, so far, engaged in extensive deliberations on the possible simplification of the registration and incorporation of micro, small and medium-sized business entities. It has become apparent through the twenty-second and twenty-third sessions of Working Group I that a business cannot be separated from its national economic and cultural context. Many countries that take a very liberal approach to business incorporation provide for certain checks and balances outside their company law, namely through business-related regulations on work, banking and insolvency. Other jurisdictions historically consider a company to be governed to a far greater extent by their respective commercial and companies acts, for instance through ex ante preventive measures of justice.

2. In addition, the range of business entities addressed by the mandate, from the most micro to medium-sized entities, poses difficult questions with regard to the level of sophistication of possible provisions for incorporation globally. Extensive contractual freedom might be problematic in countries where founders of business entities lack the education or access to legal counsel to make best use of such freedom. It might also present difficulties in areas where ex post-only provisions against misuse of limited liability pose possible problems for those states seeking to strike a balance between the rights of entrepreneurs and the rights of their creditors, be they voluntary or involuntary creditors.

3. The efforts undertaken by Working Group I have been fruitful in the sense that such aspects have become apparent and have been discussed in great honesty. The Delegation of the Federal Republic of Germany, motivated to further nurture this discussion, would like to present the following seven theses to the Working Group as a possible way forward:

(i) *Building bridges*: In order to bridge gaps between different legal traditions in terms of business incorporation, there might be a need to build the bridge from both sides of the issue. The Secretariat's suggestion to use neutral language and, where possible, explore alternative solutions to existing models might be a powerful tool to find global answers to old questions.

(ii) *Honouring what is already there*: Each and every nation member of the Commission and, more so, every nation member of the United Nations, has a company act. There might be a possible need for amendment of these acts, as seems fit to these nations. A possible UNCITRAL instrument might have an important impact on fuelling such reform. But there is also possible danger that, in fact, the Working Group might be engaging in redundant work for many countries. Globally speaking, innovative ideas for business formalization might be the best offer to make.

(iii) *"Think small first"*: It has been made clear in the Working Group that many countries understand the mandate to be growth-oriented. But "thinking small first" is not necessarily contradictory to growth and cross-border trade, especially in terms of the media and services sectors. Catering to the needs of single-member

business entities, to sole traders or business network contracts is as likely to enhance growth as is providing for extensive legal provisions designed for future expansion of multiple business partners. In many developing countries, however, limiting the possible legal burdens as much as possible might be a necessary step to enhance formalization in the first place.

(iv) *Simple, cheap and trusted*: Finding a way to set up businesses simply, at a low or minimal cost and in a way that fosters trust by business partners, the banking sector, as well as the public, including tax offices and authorities involved in public procurement, will most likely help to boost formalization. However, company law alone will not suffice; the economic and regulatory environment for micro, small and medium-sized enterprises needs to be shaped accordingly.

(v) *Making limited liability work*: Registration is not merely an administrative process; it should perform legal functions, as the gateway to legality of all business entities above a certain level of complexity. With regard to limited liability, registration should, to the best extent possible, cater to reliable company ownership transparency, preferably performing ex ante checks on the information provided by companies.

(vi) *Making information available across borders*: In a globalized economy where not only the small do business with the big, but there is also a rising demand for international sustainable suppliers among smaller businesses, global access to relevant company information needs to be timely, accurate and up to date.

(vii) *Legislative guide with optional model provisions*: If the Working Group should choose to embark on an effort to prescribe a more innovative path to registration and incorporation of business entities, as suggested above, it should be aware that treading new ground never assures instant success. That being said, as a means of guiding new solutions globally and in the spirit of the best thinking in terms of financial inclusion and economic development, it is recommended that the Working Group formulate its suggestions as a work-in-progress document, allowing legal scholars, lawmakers and the business sector to contribute and enhance such work over time with the aim of achieving the best possible solutions.